Syarikat Pembenaan Fajar Baru (Rembau) Sdn Bhd v Carrier (M) Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT6–22–92 OF 2001
NOR BEE ARIFFIN JC
25 JANUARY 2010

Contract — Sale of goods — Agreement to purchase 12 chillers — Whether chillers were duty paid or duty free — Whether mistakes that appeared on second quotation were typographical errors — Whether words that gave indication that transaction was otherwise than on duty free basis ought to be completely ignored — Whether true intention of parties that import duty was to be borne by plaintiff

The plaintiff entered into an agreement for the purchase of 12 chillers from the defendant, which was at all material in the business of supplying air-conditioning equipment. In its initial quotation to the plaintiff the defendant had quoted two offers, namely the base offer, which was the price of the chillers after the payment of import duty and sales taxes, and an alternative offer, which was the duty free price of 11 chillers plus one chiller at duty paid price. The initial quotation was in respect of chillers that were ex-Syracuse, ie where the plaintiff had to take delivery of the chillers from Syracuse, USA. The plaintiff had then allegedly requested for another quotation to be based on the alternative offer because it wanted the 11 chillers to be ex-Singapore instead of ex-Syracuse. Thereafter, the defendant prepared the second quotation which was based on the alternative offer in the first quotation. Although the price of RM3.75m as stated in the second quotation was RM70,000 more than the alternative offer stated in the first quotation the plaintiff accepted the same because the 11 chillers had become ex-Singapore with one chiller ex-CMB, ie with delivery at the defendant's site office. This second quotation and the purchase order dated 5 June 1998 constituted the agreement between the parties for the sale and supply of 12 chillers together with other related equipment at the cost of RM3.75m. Thereafter a dispute arose as to which party was liable to pay the import duty and sales tax for the 11 chillers. Although the plaintiff paid the import duty for the 11 chillers under protest, it commenced the present action seeking a refund of the money so paid, interest and costs. The plaintiff relied on the second quotation which contained the words 'duty paid for all equipment' to support its case that the price of the chillers included the import duty and sales tax. The defendant pleaded that the 11 chillers and related equipment were sold on a duty free basis as they were ex-Singapore and only one unit at duty paid as the stock was already in Malaysia. The defendant also pleaded that the mistakes in the second quotation were due to typographical errors and in the final analysis the plaintiff was to

bear the import duty. The defendant further pleaded that the typographical errors were made known to the plaintiff almost immediately upon being spotted, by way of its letter of 8 June 1998. The plaintiff denied receiving the letter of 8 June 1998 and maintained that the parties were bound by the terms and conditions of sale as set out in the second quotation as it was intended that the chillers be duty paid. The main issue in this case was whether the import duty on the chillers was to be borne by the plaintiff or the defendant.

Held, dismissing the plaintiff's claim with costs:

(1) Since the very crux of the second quotation was founded on the alternative offer, which hinged on a duty free basis, the second quotation must also necessarily be implied to be on the same basis. The plaintiff's evidence that it would not have accepted the defendant's offer if it knew that the chillers were not duty paid was untenable. The plaintiff's assertion that the duty would be paid by the defendant was not supported by any evidence, documentary or otherwise (see paras 7–8).

(2) The second quotation must be considered as a whole in the context of objective circumstances surrounding its execution and ought not to be construed by merely placing heavy reliance on the words 'duty paid' alone. The words 'duty paid' which appeared in the second quotation were clearly typographical errors as they literally ran contrary in effect to the words 'ex-Singapore' at p 1 and were not consistent with what the plaintiff had asked. Based on the circumstances of the present case it was plain that the words 'duty paid' that appeared in the second quotation were the result of typographical errors and that the plaintiff had taken unfair advantage on those errors to disclaim liability on the import duty. It did not make any commercial sense for the defendant to sell the chillers on duty paid terms at the price of RM3.75m. As such the second quotation must be construed as if the parties were transacting on the basis that the prices of the chillers were duty free and accordingly, the inclusion of the words that effectively gave indication that the transaction was otherwise than on a duty free basis ought to be completely ignored. The *contra preferentum* rule had no application in this action (see paras 9, 10, 13 & 20–21).

(3) Although the plaintiff denied receiving the defendant's letter dated 8 June 1998, there was ample evidence to show that the plaintiff had received the letter. Admittedly the said letter made no specific mention of the words 'mistakes' or 'typographical errors' but the contents of para 2 of the said letter should have made the plaintiff enquire into it. However, there was no response from the plaintiff disputing the facts contained therein (see paras 17).

[Bahasa Malaysia summary

Plaintif memasuki perjanjian untuk membeli 12 penyejuk daripada defendan, yang pada kesemua masa material dalam perniagaan membekalkan peralatan penyaman udara. Di dalam sebut harga awalnya kepada plaintif, defendan menyebut harga dua tawaran, iaitu tawaran asas, yang merupakan harga penyejuk selepas membayar cukai import dan cukai jualan dan tawaran alternatif, yang merupakan harga bebas cukai 11 penyejuk ditambah dengan satu penyejuk pada harga selepas bayaran cukai. Sebut harga awal adalah berkaitan dengan penyejuk ex-Syracuse iaitu di mana plaintif perlu mengambil serahan penyejuk-penyejuk tersebut daripada Syracuse, USA. Plaintif kemudiannya didakwa telah meminta untuk satu lagi sebut harga yang berdasarkan kepada tawaran alternatif kerana ia mahu 11 penyejuk untuk ex-Singapura dan bukan ex-Syracuse. Kemudian, defendan menyediakan sebut harga kedua yang berdasarkan kepada tawaran alternatif di dalam sebut harga pertama. Walaupun harga 3.75 juta seperti yang dinyatakan di dalam sebut harga kedua adalah RM700,000 lebih daripada tawaran alternatif yang dinyatakan di dalam sebut harga pertama plaintif menerimanya kerana 11 penyejuk tersebut telah menjadi ex-Singapura dengan satu penyejuk ex-CMB, iaitu dengan penghantaran ke pejabat tapak defendan. Sebut harga kedua dan perintah pembelian bertarikh 5 Jun 1998 membentuk perjanjian di antara pihak-pihak untuk jualan dan pembekalan 12 penyejuk bersama dengan peralatan lain yang berkaitan pada harga RM3.75m. Kemudian pertikaian berbangkit mengenai pihak mana yang bertanggungjawab untuk membiayai cukai import dan cukai jualan untuk 11 penyejuk tersebut. Walaupun plaintif membayar cukai import untuk 11 penyejuk tersebut dengan bantahan, ia memulakan tindakan ni memohon pengembalian wang yang dibayar, faedah dan kos. Plaintif bersandarkan kepada sebut harga kedua yang mengandungi perkataan 'duty paid for all equipment' untuk menyokong kesnya bahawa harga penyejuk termasuk cukai import dan cukai jualan. Defendan merayu bahawa 11 penyejuk dan peralatan berkaitan dijual atas asas bebas cukai kerana ia adalah ex-Singapura dan hanya satu unit dengan cukai dibayar kerana stok telah pun berada di Malaysia. Defendan juga merayu bahawa kesilapan di dalam sebut harga kedua adalah disebabkan oleh kesilapan menaip dan di dalam analisis terakhir plaintif sepatutnya membayar cukai import tersebut. Defendan selanjutnya merayu bahawa kesilapan menaip diberitahu kepada plaintif serta merta selepas diketahui, melalui suratnya yang bertarikh 8 Jun 1998. Plaintif menafikan menerima surat bertarikh 8 Jun 1998 dan mengekalkan bahawa pihak-pihak terikat dengan terma-terma dan syarat-syarat seperti yang dinyatakan di dalam sebut harga kedua kerana ia diniatkan bagi penyejuk tersebut dibayar cukai. Isu utama kes ini adalah sama ada cukai import ke atas penyejuk dibayar oleh plaintif atau defendan.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Oleh kerana isi penting sebut harga kedua diasaskan kepada tawaran

alternatif, yang bergantung kepada dasar bebas cukai, sebut harga kedua sepatutnya ditafsirkan atas dasar yang sama. Keterangan plaintif bahawa ia tidak akan menerima tawaran defendan jika ia mengetahui bahawa penyejuk tersebut tidak dibayar cukai tidak boleh diterima. Kenyataan plaintif bahawa cukai akan dibayar oleh defendan tidak disokong oleh apa-apa keterangan, sama ada dokumentar atau sebaliknya (lihat perenggan 7–8).

(2) Sebut harga kedua mesti dipertimbangkan secara menyeluruh di dalam konteks keadaan persekitaran yang objektif dalam pelaksanaan dan tidak boleh ditafsirkan sebagai semata-mata bergantung secara besar kepada perkataan 'duty paid' sahaja. Perkataan 'duty paid' yang timbul di dalam sebut harga kedua jelas adalah kesilapan menaip kerana ia secara jelas bertentangan dengan perkataan 'ex-Singapore' di ms 1 dan tidak konsisten dengan apa yang plaintif minta. Berdasarkan kepada hal keadaan kes ini, jelas bahawa perkataan 'duty paid' yang terdapat di dalam sebut harga kedua adalah disebabkan oleh kesilapan menaip dan bahawa plaintif telah mengambil kesempatan yang tidak adil atas kesilapan tersebut untuk menafikan liabiliti atas cukai import. Ia tidak berasas dari segi perniagaan untuk defendan menjual penyejuk atas terma cukai dibayar pada harga RM3.75 juta. Oleh itu sebut harga kedua perlu ditafsirkan seperti pihak-pihak membuat transaksi atas dasar bahawa harga penyejuk adalah bebas cukai dan oleh itu pemasukan perkataan yang secara berkesan memberi tanda bahawa transaksi adalah sebaliknya daripada atas bebas cukai sepatutnya tidak diendahkan sama sekali. Prinsip *contra preferentum* tidak ada aplikasi di dalam tindakan ini (lihat perenggan 9, 10, 13 & 20–21).

(3) Walaupun plaintif menafikan menerima surat defendan bertarikh 8 Jun 1998, terdapat keterangan yang jelas untuk menunjukkan bahawa plaintif telah menerima surat tersebut. Diakui surat tersebut tidak membuat apa-apa rujukan spesifik kepada perkataan 'mistakes' atau 'typographical errors' tetapi kandungan perenggan 2 surat tersebut sepatutnya membuat plaintif menanyakan perkara tersebut. Walau bagaimanapun, tidak ada penafian daripada plaintif menafikan fakta yang terkandung di dalamnya (lihat perenggan 17).]

Notes

For cases on sale of goods generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5121–5123.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor [2002] 6 MLJ 186; [2002] 7 CLJ 175, HC (refd)

A *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405; [1994] 2 CLJ 25, SC (refd)
Marchant v Charters [1977] 3 All ER 918, CA (refd)
Ng Slew Wah & Ors v MAA Holdings Sdn Bhd & Anor [1985] 2 MLJ 332, SC (folld)
B *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153, HC (refd)
Wilson v Wilson (1854) 5 HLC 39; (1854) 10 ER 811 (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283, CA (refd)
Woo Yew Chee v Yong Yong Hoo [1979] 1 MLJ 131, FC (refd)

C *Zatul Izra (Krishna Dallumah) for the plaintiff.*
Gary Yap (Raja Darryl & Loh) for the defendant.

Nor Bee Ariffin JC:

D BRIEF FACTS

[1] The plaintiff wanted to purchase 12 chillers for its projects in Jalan Tun Razak, Ipoh, Johor Bharu and Sungai Buloh. The defendant which is in the E business of distribution, servicing and rental of air conditioning equipment, supply and installation of air conditioning systems provided an initial quotation dated 22 May 1998 (exh P1) which contained two offers, the based offer and the alternative offer. The based offer was for duty paid ie import duty and sales taxes already paid and the net price quoted was RM4.8m. The F alternative offer was for duty free ie without payment of import duty and sales taxes on 11 chillers and one at duty paid price and the net price quoted was RM3.68m, ex-Syracuse, USA. The plaintiff declined both offers and requested for a second quotation. The defendant prepared another quotation dated 25 May 1998 (exh P2) and made only one offer. According to the defendant, the G plaintiff had asked for another quotation to be based on the alternative offer because the plaintiff had wanted the 11 chillers to be ex-Singapore instead of ex-Syracuse, USA and also to obtain tax exemption from the government. It was common ground that the chillers and related equipment mentioned in the second quotation were the same as those stated in the alternative offer with the H difference only in terms of logistic in that instead of ex-Syracuse, USA, the 11 chillers had become ex-Singapore with one chiller ex-CMB. The expression 'ex-Syracuse', 'ex-Singapore' and 'ex-CMB' mean the plaintiff takes delivery of the chillers from Syracuse, USA or Singapore or the defendant's site office in Subang Jaya respectively. The price stated in the second quotation was I RM3.75m, RM70,000 more than the alternative offer. The plaintiff accepted the second quotation. This and a purchase order dated 5 June 1998 (exh P3) constituted the agreement between the parties for the supply and sale to the plaintiff of nine 23XL4040ED60 and three 19XL4040413CD chillers together with other related equipment at the costs of RM3.75m.

[2] Dispute arose as to which party was liable to pay the import duty and sales taxes for the 11 chillers. The plaintiff claimed that the prices stated in the agreement included the payment of import duty and that as the progress at the four sites were delayed due to the defendant refusal to honour its obligation, the plaintiff felt compelled to settle the import duties first and claimed the amount later They paid the defendant under protest the sum of RM1,002,359.40 for import duty, RM4,018 for storage and containers demurrage charges and RM8,212 for custom clearance to mitigate their damages and losses. The plaintiff seek the refund of the money so paid, interest and cost.

[3] The defendant pleaded that the 11 chillers and related equipment were sold on a duty free basis as they were ex-Singapore and only one unit at duty paid as the stock was already in Malaysia. The 11 chillers were eventually shipped to Port Klang at the written request of the plaintiff (exh D22). The defendant also pleaded that there were genuine typographical errors in the second quotation. The prices stated therein to be inclusive of duty was a mistake as it should have been read as per the scope of supply, ie the duty and taxes to be excluded. The defendant also pleaded the operation of estoppel to preclude the plaintiff from saying that the chillers were duty free since the plaintiff had acknowledged that those meant for the Sungai Buloh project were duty free.

THE ISSUES

[4] It is pertinent to bear in mind at the outset that there was in existence a valid offer and acceptance between the parties when the plaintiff accepted the defendant's second quotation and as set out in the purchase order, instructed the defendant to supply the chillers. The defendant was not disputing the existence of a valid contract with the plaintiff but was merely saying that upon a true construction of the agreement, the mistakes in the second quotation were only typographical errors and in the final analysis, the plaintiff was to bear the import duty.

[5] Two issues as in bundle C were posed for determination by the court. Firstly, whether there was a term in the agreement between the plaintiff and the defendant that all import duty of the said equipment would be paid by the defendant. Secondly, whether the plaintiff had received the defendant's letter dated 8 June 1998. The first issue requires the construction of the second quotation as well as the surrounding contemporaneous documents to ascertain whether the prices of the chillers were intended to be duty paid and whether there were typographical errors in the second quotation that had resulted in the intention of the parties to the transaction to have been misconstrued.

[6] Four witnesses gave evidence. The plaintiff's sole witness ('PW1') was its former business manager and the person directly involved in the purchase of the chillers. The defendant's first witness ('DW1') was the person PW1 had direct dealing with whilst the second ('DW2') was responsible for the issuance of the defendant's invoices and demanding payments from the plaintiff. The third witness ('DW3') was the senior officer of DW1 and the person overseeing the transaction.

FINDINGS OF THE COURT

[7] It is an undisputed fact that the second quotation was prepared based on the alternative offer in the first quotation. That fact is of great significance and it is, to my mind, a crucial aspect for consideration in order to find out what exactly was the kind of transaction the parties had intended to engage in as regards the revised quotation. DW1's testimony that the plaintiff's request for another quotation to be based on the alternative offer because the plaintiff had wanted the 11 chillers to be ex-Singapore instead of ex-Syracuse, USA and also to obtain a duty exemption from the government, went unchallenged. PW1 herself in fact had testified that ex-Singapore was more convenient to the plaintiff than ex-Syracuse. Also not challenged was the fact that the chillers referred to in the alternative offer and the second quotation were the same except for the prices. PW1 confirmed that the second quotation was RM70,000 more that the alternative offer. That RM70,000 increase, explained DW1, was due to the shipping charges from the USA to Singapore. As the alternative offer hinged on a duty free basis, the second quotation must also necessarily be implied to be on the same basis. Had the alternative offer been accepted, it would simply mean that quite apart from the one unit of a 19XL chiller which was already in the possession of the defendant, the plaintiff would have to bear the shipping cost from USA to Malaysia and import duty for the nine units of 23XL chillers and two units of 19XL. As the plaintiff would be liable to pay for the duty and taxes had the chillers been ex-Syracuse, obviously the plaintiff would be equally liable for the chillers ex-Singapore or Port Klang in the like manner and the plaintiff must be held to have known all along that the prices quoted was to the exclusion of duty and taxes.

[8] Since the very crux of the second quotation founded its basis on the alternative offer, it follows therefore their dealing should have been conducted on that assumption. PW1's testimony that the plaintiff would not have accepted the defendant's offer if it knew that the chillers were not duty paid because the plaintiff could not commit itself when it had no idea of the amount of duty involved, is untenable. The amount of duty to be paid was certainly not the reason why the plaintiff declined to accept the alternative offer but rather it was the lower price that they were looking for. The assertion by PW1 that DW1 had given his assurance that the duty would be paid by the defendant is not

supported by any evidence, documentary or otherwise. The denial by DW1 that he had given such assurance seem to me consistent with the factual matrix of this case as the parties had moved from ex-Syracuse to ex-Singapore. DW1 also denied the suggestion by learned counsel for the plaintiff Mr Krishna Dallumah that he had to reduce the price to beat other competitors as the plaintiff was also looking for other quotations. No evidence was led by the plaintiff to show that the plaintiff had in fact looked for other competitors.

[9] I subscribed to the submission by learned counsel for the defendant, Mr Peter Douglas Ling that the second quotation must be considered as a whole in the context of objective circumstances surrounding its execution and not merely placing heavy reliance on the words 'Duty Paid' alone to construe the second quotation. In *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405; [1994] 2 CLJ 25, the issue before the Supreme Court was whether the facility given in the letter of 7 March 1986 was a new facility or a continuing facility secured by the existing charges. In ruling that it was a continuing facility, the court held that:

> In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance (*Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131 (FC); *Addiscombe Garden Estates Ltd and another v Crabbe and others* [1958] 1 QB 513 (CA).

DW1 testified that the second quotation was handwritten drafted by him and his office assistant Cik Azrina had inadvertently copied by computer the heading of the based offer (duty paid for all equipment) and the columns 'Location' and 'Model' in the based offer of the first quotation. Typographical errors appeared in a number of places in the second quotation. At p 1, there appeared the words 'Based Offer' and 'Alternative Offer' corresponding to the word 'Delivery'. At p 2, there is the subheading 'BASE OFFER (DUTY PAID FOR ALL EQUIPMENT)'. Then at pp 3–4, there are the words 'DUTY PAID'. At p 6 there is the subheading 'SCOPE OF SUPPLY FOR ALTERNATIVE OFFER'.

[10] I had referred to them as typographical errors because it has been established that there was only one offer in the second quotation. So the subheading to the quotation which carried the words 'BASE OFFER (DUTY PAID FOR ALL EQUIPMENT)' and the details by the side of the chiller number which had stated the words 'Duty Paid' must be typographical errors as there should not be now a based offer in whatever sense. PW1 agreed that the descriptions in columns 'Location' and 'Model' in both quotations were exactly the same. Her evidence thus confirmed DW1's testimony that his office assistant had inadvertently copied the columns 'Location' and 'Model' in the

based offer of the first quotation. It is also obvious to me that pp 2, 3 and 4 of the second quotation must have been directly copied from pp 1, 2, 3 and 4 of the first quotation. Then at pp 3 and 4 of the second quotation, the words 'DUTY PAID' literally ran contrary in effect to the word 'ex-Singapore' at p 1. As said by DW1 and DW3, they were clearly typographical errors as they were not consistent with what the plaintiff had asked and I have no reason to disagree with them. At p 6 of the second quotation — the heading 'Scope Of Supply For Alternative Offer' was not supposed to be there as there was no based offer or alternative offer in the second quotation. The subheading was clearly copied from p 6 of the first quotation.

[11] PW1 insisted that the copying was not a mistake because before the deal was concluded, she and her managing director Mr Koh Im Seong had gone through exh P2 item by item with DW1 and DW3. There was evidence to suggest that negotiations were taking place and consequent to that the amendments were made as appeared at pp 1, 2, 3, 4, 5 and 6. It is important to note that the amendments were confined primarily to the terms of payment whereby additional conditions were added in. There was also some editing to the plaintiff's name and a few other matters appeared to have been looked at, all except matters pertaining to the prices of the chillers whether they be duty paid or otherwise. PW1 again insisted that should there be any error, it should have been clarified and discussed before the purchase order was accepted. It is misconceived to contend that having gone through several rounds of negotiations whatever needed to be amended and agreed upon by both parties would have been amended by DW1 as he had signed all the amendments made as appeared at various pages of the second quotation. I said so because PW1 herself had obviously overlooked the error on the face of the second quotation. At p 1, corresponding to the word 'Transportation' was the words '(b) Ex-Singapore for 9 nos of 23x14040ed60 and 2 nos of 19XL404013CD'. So the 11 chillers remained as ex-Singapore. If at all the said chillers were to be duty paid, the transportation term at p 1 of the second quotation should not have stated 'ex-Singapore' but instead should have stated 'ex-CMB' or ex-any site in Malaysia ie to collect from the defendant's premise or any site in Malaysia after the defendant has made custom clearance for all the chillers. PW1 could have objected to the term used but have not chosen to do so. Under the circumstances, it is only fair to assume that her inaction indicate consent and knowledge on the part of the plaintiff that the delivery was ex-Singapore. By the same token, the plaintiff also knew that the chillers were duty free.

[12] PW1 agreed that the parties were bound by the terms and conditions of the sale. Clause 5 appearing at pp 16, 18, 20 and 22 (reference to pages in bundle B) in the second quotation under the subheading the 'TERMS AND CONDITIONS OF SALE' stated that 'Prices quoted do not include DUTY, SURTAX, SALES and/or EXISE DUTY prevailing at that time of quotation,

unless specifically stated in the quotation'. PW1 argued that the subheading and the said details have qualified the general term of cl 5, but I do not think so. The said TERMS AND CONDITIONS OF SALE must necessarily be read together with the 'Scope of Supply' appearing at p 5 which detailed out what were being included and what were being excluded from the prices of the chillers quoted at pp 2, 3 and 4. PW1 acknowledged that in item 2 under the heading 'Scope of Supply', it was stated that the prices of the chillers quoted excluded duty and taxes and this, she agreed, implied that the plaintiff had to pay custom clearance at the Port of Singapore. She likewise acknowledged that at p 6 it was stated that prices excluded import duty and taxes, shipping cost from USA to Malaysia and custom clearance at Malaysia port. One may argue that there is direct contradiction between what was stated in the 'Scope of Supply' and the description or label given to the chillers at pp 2, 3 and 4 but the court must look beyond the terminology of the label to the actual fact of the situation. The ultimate test is whether it was intended that the chillers be duty paid or duty free. In the case of *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131, Raja Azlan Shah Ag CJ (as His Majesty then was) cited the remark by Lord Denning MR in *Marchant v Charters* [1977] 3 All ER 918 at p 922 as follows:

> It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is exclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?

[13] The label put to the said chillers alone cannot be the sole conclusive factor in determining whether the parties intended the chillers to be duty paid but the entire circumstances must be worked out. The circumstances seem to me to point to the prices for the 11 chillers quoted were not intended to be duty paid. I think it is plain to the parties that the words having the effect of duty paid appearing in the second quotation were results of typographical errors and it is apparent to me that the plaintiff had unfair advantage on those errors to disclaim liability on the import duty. I consider the defendant's contention worthy of merits when DW1 said that it would not make any commercial sense for the defendant to sell all the chillers to the plaintiff on duty paid terms because the price difference between the based offer of RM4.8m in the first quotation and the offer of RM3.75m in the second quotation represented a reduction of RM1,050,000. It is illogical for the defendant to offer such a large discount and yet pay the duty of over RM1m for the plaintiff.

[14] In a letter dated 3 August 1998 (exh D21) under the heading 'Sungai Buloh', the plaintiff acknowledged that two chillers specified therein were sold on duty free basis. PW1 however claimed that to be an error. She put the blame on the defendant for the mistake because those were said to be copied from the defendant's letter dated 28 July 1998 (exh D20) where the plaintiff was to indicate the expected date of delivery in column 5 under the heading 'Expected Delivery Date'. The acknowledgment on the error was despite her insistence that the chillers were duty paid. It is important to note that this acknowledgment came about before the plaintiff registered its objection to the defendant's demand that the plaintiff was to pay for the import duty in a letter of 17 October 1998. Whilst the defendant took instantaneous step to assert and clarify that the chillers were not meant to be on a duty paid basis upon receipt of the purchase order, the plaintiff took no such action with respect to exh D20. Evidence showed that the plaintiff made no effort at all to put any correction across to the defendant. Putting the blame on the defendant during the trial is a bare assertion and nothing else. On such failure to respond, the Court of Appeal in *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 has this to say:

> During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December 1991. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.
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> In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 at p 487:
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> In *Wiedemann v Walpole* [1891] 2 QB 534 at p 537, an action for breach of promise, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.
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> Lord Esher MR, in his judgment, remarked, 'Here, we have only to see whether *the mere fact* of not answering the letters, *with nothing else* for us to consider is any evidence in corroboration of the promise'. (Emphasis added.) Earlier, in his judgment, he said, '*Now there are cases — business and merchantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree*'. (Emphasis added.)

[15] The plaintiff in the present case must be regarded as not disputing the content of exh D20 on the prices of the chillers when choosing not to put up a rebuttal or protest when replying exh D20 in exh D21. That and the acknowledgment in exh D21 showed that the plaintiff knew that the dealing transacted between the parties was on the basis that the prices of the chillers

were to be duty free. It would be unjust to allow the plaintiff to go back on that transaction as intended by them and the plaintiff must be estopped from doing so (*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331). With the reasons stated, I have answered the first issue in the negative.

[16] If the defendant's letter of 8 June 1998 is proved to have been received by the plaintiff, that will lend further support to the defendant's stand that the typographical errors were made known to the plaintiff almost immediately upon being spotted and that the plaintiff was well aware of the nature of the dealing they were to transact in. This second issue to be determined by the court have been agreed to by the parties and therefore any suggestion or assertion that the matter was not pleaded is a non-starter as both were fully aware that it would be a matter for litigation. Furthermore, as submitted by Mr Peter Douglas Ling, the defendant was pleading evidence and not material facts. As it concern exh D16, it is trite that only materials facts need to be pleaded and not evidence (*Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153).

[17] DW1 testified that on Friday afternoon of 5 June 1998 when he received the plaintiff's purchase order, he signed a letter dated 8 June 1998 (exh D16/P18) to PW1 and Mr Koh Se Lian which in essence acknowledged receipt of the purchase order, confirmed several matters discussed earlier on and clarified that the chiller prices were duty free in accordance with the scope of supply stated. DW1 admitted to the suggestion by Mr Krishna Dallumah that there was no evidence to show that the letter was sent. PW1 denied receiving it but I find that there is ample evidence to show that the plaintiff had indeed received the letter. DW1 testified in clear terms that he faxed the letter, called the plaintiff and they acknowledged and noted it though he could not remember who noted it. On further proof that the plaintiff did receive the letter of 8 June 1998, reference to that letter (6.4/LCH/980608–001) was made in the defendant's letter of 28 July 1998 to the plaintiff (exh P4). The date nor the gist of its content might not have been laid out in exh P4 but that does not alter the fact that reference was made to the letter of 8 June 1998. Admittedly the letter of 8 June 1998 made no specific mention of the words 'mistakes' or 'typographical errors' but the content of para 2 should have put the plaintiff on guard that the second quotation must be inquired into. The plaintiff did not reply exh P4 and neither did the plaintiff make a prompt and vigorous denial receiving the letter of 8 June 1998. As there was no response from the plaintiff, the plaintiff must necessarily be held to have admitted receiving the letter of 8 June 1998 and not disputing the fact contained therein. Support is found again in the decision of the Court of Appeal in *Wong Hon Leong David v Noorazman bin Adnan*.

[18] The plaintiff's letter of 28 August 1998 (exh D17) enclosed with it three other letters dated 27 August 1998 (exh D17A) and 26 August 1998 (exh D17B). The third letter according to DW1 was the letter dated 8 June 1998 (exh D18) but that met with resistance from PW1 because the words 'your company's letter of offer' which appears in para 2 of exh D17 obviously must have referred to the second quotation. DW1 contended that the third letter referred to in exh D17 was the letter dated 8 June 1998 as the defendant's record showed that the letter was clipped together with exh D17 and sent to the GM's office. The relevant caption of para 2 reads 'You will note from the various letters that the problems arose not due to our fault but to the confusion and ambiguity of your company's letter of offer, a copy of which is also enclosed' I take note that the words 'the confusion and ambiguity caused by your letter of offer dated 25th May 1998' was used in exh D17B. Therefore in all probabilities, the third letter meant was the second quotation and not the letter of 8 June 1998. Be that as it may, it should also be noted that the same words conveyed the message that as at 26 August 1998, the plaintiff had acknowledged that all was not well with the second quotation and 'the various letters' referred to in para 2 must be pointing at the letters dated 8 June 1998 and 28 July 1998 (exh P20). For the reasons mentioned, I find that there were ample evidence to point that the plaintiff had received the letter dated 8 June 1998 notwithstanding the absence of proof of it being faxed. The second issue is answered in the affirmative.

[19] What happened then if there are obvious typographical or clerical error on the face of a contract? The Supreme Court in *Ng Siew Wah & Ors v MAA Holdings Sdn Bhd & Anor* [1985] 2 MLJ 332 ruled the following:

> Be that as it may, it is an established principle that rectification is not necessary if there is obvious mistake or misnomer in a document. No court will allow people to take advantage of a misnomer or a typing error when everyone knows what was intended. Thus, in *Nittan (UK) Ltd v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633, Lord Brightman LJ said at p 639:
>
> ln my opinion, in construing a document, the court is at liberty, as a matter of construction, to correct a misnomer. A misnomer is not, in my view, necessarily a mistake which requires the equitable remedy of rectification. The misnomer may be a mere clerical error. A simple example would be the use in a conveyance of the expression 'the vendor' where clearly 'the purchaser' was intended. It is not necessary to rectify the conveyance to enable it to be read and take effect as the parties plainly intended.
>
> Similarly in *Wilson v Wilson* (1854) 5 HLC 39; (1854) 10 ER 811, Lord St Leornards said at p 822:

> But the question still arises, what is the true construction of the contract? Now it is a great mistake if it be supposed that even a court of law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake and it admits of no other construction, a court of law, as well as a court of equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes — without, I say, going into those cases at all, both courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty … There was no question about going contrary to the intention. It struck everybody who looked on it that it was a clear error.

[20] The legal principles in *Ng Siew Wah* clearly stated that rectification is not necessary if there is obvious mistakes or misnomer in a document. Applying the principle to the present case, I hold that the second quotation must be construed as if the parties was transacting on the basis that the prices of the chillers were duty free and accordingly, the inclusion of the words that effectively give indication that the transaction is otherwise than on a duty free basis must be completely ignored. In fact, by taking away all those words, the second quotation comprehensively presented only one offer. As said in *Wilson v Wilson* (1854) 5 HLC 39; (1854) 10 ER 811, there was no question about going contrary to the intention. The exclusion of the very words effectively restored what the parties had intended the transaction to be, namely the import duty was to be paid by the plaintiff.

[21] It was submitted to me by Mr Krishna Dallumah that since there was ambiguity as to which is the actual provision of the agreement whether the terms 'Duty Paid' or 'The Terms and Conditions of Sale' and the 'Scope of Supply', the maxim *generalibus specialia derogant* should apply where the term 'Duty Paid' to override the other two and relied on the case of *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186; [2002] 7 CLJ 175 in support thereof. The maxim simply means a specific provision overrides a general provision. The submission on the application of the maxim is to my mind misplaced. There is no ambiguity whatsoever in the second quotation that the chillers were meant to be duty free. It necessarily follows therefore the *contra proferentum* rule also has no application in this action.

[22] For the reasons indicated, I hold that the plaintiff has not proved its claim for the refund and the defendant had successfully established that there were mistakes due to typographical errors in the second quotation which given the proper construction in accordance with the true intention of the parties to

A the transaction, the import duty for the 11 chillers were to be borne by the plaintiff. I therefore dismiss the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs.

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Reported by Kohila Nesan

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